GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
MAYOR'S OFFICE OF LEGAL COUNSEL
Freedom of Information Act Appeal: 2016-11

November 24, 2015

VIA ELECTRONIC MAIL

Zenia Sanchez Fuentes

RE: FOIA Appeal 2016-11

Dear Ms. Fuentes:

This letter responds to the administrative appeal you filed with the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In your appeal, you assert that the Department of Health Care Finance ("DHCF") improperly withheld records you requested under the DC FOIA.

Background

On August 5, 2015, you sent four requests to DHCF for "documents related to transportation assistance under the Early and Periodic, Diagnostic and Treatment Services (EPSDT) services program of Medicaid provided by DHCF's contractor, Health Services for Children with Special Needs, Inc. ("HSCSN"). . . ." On September 16, 2015, DHCF granted in part and denied in part your requests. In specific, DHCF withheld fifteen (15) records as trade secrets protected under D.C. Official Code § 2-534(a)(1) ("Exemption 1").[1]

On appeal, you challenge DHCF's withholding of responsive records. You contend that Exemption 1 is not applicable because the requested documents are related to government contracts, government policy manuals, and oversight documentation regarding the administration of a public service. Further, you argue that even if Exemption 1 were applicable, DHCF should have reasonably segregated the withheld documents.

DHCF provided this office with a memorandum in response to your appeal on November 13, 2015, reaffirming its decision to withhold records under Exemption 1.

Discussion

It is the public policy of the District of Columbia government that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-531. In aid of that

[1] Exemption 1 exempts from disclosure "trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would results in substantial harm to the competitive position of the person from whom the information was obtained."

policy, the DC FOIA creates the right "to inspect . . . and . . . copy any public record of a public body . . ." *Id*. at § 2-532(a). The right to inspect a public record, however, is subject to exemptions. *Id*. at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act. *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

The instant matter involves the protection of proprietary interests from public disclosure. To withhold responsive records under Exemption 1, DHCF must show that the information: (1) is a trade secret or commercial or financial information; (2) was obtained from outside the government; and (3) would result in substantial harm to the competitive position of the person from whom the information was obtained. D.C. Official Code § 2-534(a)(1). The D.C. Circuit has defined a trade secret, for the purposes of the federal FOIA, "as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Public Citizen Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983). The D.C. Circuit has also instructed that the terms "commercial" and "financial" used in the federal FOIA should be accorded their ordinary meanings. *Id* at 1290.

Exemption 1 has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987); *see also, Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989). In construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). *See also McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would 'likely' do so. [citations omitted]"). The passage of time can reduce the likelihood of competitive harm. *See Teich v. FDA*, 751 F. Supp. 243, 253 (D.D.C. 1990) (rejecting competitive harm claim based partly upon fact that documents were as many as twenty years old). *But see Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 93 F. Supp. 2d 1, 16 (D.D.C. 2000) (declaring that "[i]nformation does not become stale merely because it is old").

Generally, records are "commercial" as long as the submitter has a "commercial interest" in them. *See Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). *But see Chicago Tribune Co. v. FAA*, 1998 U.S. Dist. LEXIS 6832, *6 (N.D. Ill. May 5, 1998) (finding that chance events that happened to occur in connection with a commercial operation were not commercial information regarding documentation of medical emergencies during commercial fights). Although it is unnecessary to engage in a "sophisticated economic analysis of the likely effects of disclosure, conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents." *Watkins v. United States Bureau of Customs*, 643 F.3d 1189, 1195 (9th

Cir. 2011). Instead, a court may make a determination of economic harm by considering the cost of obtaining the withheld information, and the possible windfall to competition that would result from its release, such as whether:

> a competitor could use the content of the [records] affirmatively to wreak competitive harm on Pfizer by acquiring records that, according to Pfizer and undisputed by the plaintiff, show what is and is not working in companies' marketing from the perspective of its customers. *See id*. . . .In applying the *National Parks* test, the D.C. Circuit noted that when commercial information "is freely or cheaply available from other sources ... it can hardly be called confidential and agency disclosure is unlikely to cause competitive harm." *Id.* at 51. Nevertheless, when "competitors can acquire the information only at considerable cost, agency disclosure may well benefit the competitors at the expense of the submitter." *Id.*

Pub. Citizen v. United States Dep't of Health & Human Servs., 66 F. Supp. 3d 196, 213 (D.D.C. 2014)

Documents 1-14

Your overarching contention on appeal is that records you seek pertaining to the contracts between HSCSN and subcontractors are required to be disclosed under D.C. Official Code § 2-361.04.[2] This argument is unpersuasive for two reasons. First, the withheld records are not contracts between a public body and a private entity. Rather, the records consist of or relate to contracts between private parties - HSCSN and its subcontractors. While D.C. Official Code § 2-361.04 mandates the disclosure of contracts in which the District is a party, it is unclear whether this statute applies to subcontracts in which the District is not a party. As a result, it is unclear whether contracts, contract reviews, policy books, customer satisfaction surveys, or vehicle inspections carried out between a government contractor and private subcontractors can be considered "determinations [,] findings, contract modifications, change orders, solicitations, or amendments associated with the contract" under D.C. Official Code § 2-361.04. The statute provides that "The [Chief Procurement Officer] shall establish and maintain . . . publicly-available information regarding District procurement." Here, the District had no involvement in the procurement at issue in the withheld records. We are therefore not convinced that this provision of the Procurement Practices Reform Act mandates disclosure of the records that DHCF withheld.

Second, assuming, *arguendo*, that subcontracts and documents related to subcontracts should be disclosed in accordance with D.C. Official Code § 2-361.04, these records may still be subject to redaction under the DC FOIA. The crux of this matter is whether HSCSN's subcontracting process, reflected in Documents 1-14, constitutes commercial information. This Office

[2] D.C. Official Code § 2-361.04 provides, in relevant part, that the following should be publicly available for contracts in excess of $100,000: "a copy of the contract and any determinations and findings, contract modifications, change orders, solicitations, or amendments associated with the contract, including those made by District agencies exempt from the authority of the [Chief Procurement Officer] . . ."

conducted an *in camera* review of the fifteen documents that DHCF withheld. Documents 1-14 include subcontracting agreements, amendments to agreements, internal policy, review of the subcontracts by the prime contractor, and extensive customer satisfaction surveys. The process of selecting, managing, reviewing, and analyzing subcontractors is conducted at a cost to HSCSN. Releasing information about this process would amount to a windfall to HSCSN's competitors and could limit HSCSN's ability to competitively vie for future similar contracts. *See Pub. Citizen*, 66 F. Supp. 3d at 213.

Based on DHCF's representations and our *in camera* review of the documents, it is evident that the documents contain commercial and financial information provided by a party outside the government sufficient to meet the threshold for protection under Exemption 1. We agree with DHCF's claim that actual competition exists from HSCSN and that disclosure of the information would allow competitors to see HSCSN's strategy for monitoring and managing its subcontractors and take potential clients and business. Therefore, we find that the commercial and financial information in Documents 1-14 was properly withheld under Exemption 1. *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1190 (D.C. Cir. 2004) ("release of prices for certain CLINs composed predominantly of the costs of materials and services it procures from other vendors would enable its competitors to derive the percentage . . . by which McDonnell Douglas marks up the bids it receives from subcontractors."); *see also GAO Protest of Richen Management, LLC*, B-406750, B-406850 (July 31, 2012) (The Government Services Administration ("GSA") received FOIA requests seeking, among other things, copies of contract amounts, staffing, and a list of subcontractors for the incumbent contracts covered by these RFPs. The GSA responded to the requests by stating that subcontractor information was being withheld under exemption 4 of the federal FOIA since release would reveal to competitors commercially sensitive information concerning the incumbent contractor's internal operations and business practices.)

Under DC FOIA, even when an agency establishes that it has properly withheld a document under an exemption, it must disclose all reasonably segregable, nonexempt portions of the document. *See, e.g., Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1167 (D.C. Cir. 2011). "To demonstrate that it has disclosed all reasonably segregable material, 'the withholding agency must supply a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.'" *Judicial Watch, Inc. v. U.S. Dep't of Treasury*, 796 F. Supp. 2d 13, 29 (D.D.C. 2011) (quoting *Jarvik v. CIA*, 741 F .Supp. 2d 106, 120 (D.D.C. 2010)).

Regarding the segregability of Documents 1-14, we find that the entire documents are protected from disclosure under Exemption 1. The numerical values in the documents are clearly protected information showing HSCSN's subcontractors commercial and financial pricing. Additionally, the categories and descriptions in the documents reveal HSCSN's commercial and financial strategy in managing and analyzing subcontractors. This information, if disclosed, could cause substantial competitive harm to HSCSN by providing a windfall to its competitors.

Document 15

Document 15 consists of a document titled "DC Vehicle Inspection Record." It appears to be an inspection report of a vehicle bearing a Maryland license plate, and it contains some personally identifiable information (e.g., driver's license and VIN numbers). Because it is unclear how this document constitutes a trade secret or commercial information, we remand the record to DHCF. DHCF shall either: (1) release the document subject to appropriate redactions; or (2) provide a more detailed explanation as why the document should be withheld.

Conclusion

Based on the foregoing, we affirm DHCF's decision in part and remand it in part. Within seven (7) business days from the date of this decision, DHCF shall, in accordance with the guidance provided in this determination, reconsider its withholding of Document 15.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with the DC FOIA.

Sincerely,

/s Melissa C. Tucker

Melissa C. Tucker
Associate Director
Mayor's Office of Legal Counsel

cc: Kevin O'Donnell, Attorney Advisor, DHCF (via email)